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**PREVIEW; *Cross v. Warren*:  
Can Injured Third-Parties Stack Liability Insurance?**

**Elliott McGill**

The Montana Supreme Court Oral Argument is scheduled for Friday, September 21, 2018 at 10:00 a.m. at the Red Lion Hotel in Kalispell, Montana. Colin Gerstner is expected to argue on behalf of the Appellants, and Susan Moriarty Miltko is expected to argue on behalf of Appellees.

**INTRODUCTION**

This case concerns third-party motor vehicle liability insurance and whether it can be “stacked” under Montana law. Kenneth Cross, Henley Brady, and Roland Redfield (collectively “Appellants”) sustained injuries in a motor vehicle collision.<sup>1</sup> The at-fault driver, Taylor Warren, was insured under a liability policy issued by Progressive.<sup>2</sup> The policy covering the truck Taylor was driving at the time of the accident was covered under one of four liability policies the Warren family purchased to cover their four vehicles individually.<sup>3</sup> The Appellants argue that each of the Warrens’ four Progressive policies should be “stacked” to allow recovery beyond the “per person” limit provided the individual Progressive policy.<sup>4</sup> Taylor Warren, his parents, and Progressive (collectively “Appellees”) respond that Montana law prevents stacking multiple third-party liability policies, and in the alternative, even if stacking of the coverage is allowed, Progressive satisfied the statutory requirements necessary to prevent Appellants from doing so.<sup>5</sup>

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On January 8, 2015, Taylor Warren crashed his parents’

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<sup>1</sup> Appellant’s Opening Brief at 2, *Cross v. Warren*, [https://supremecourtdocket.mt.gov/APP/connector/9/368/url/321Z246\\_03WCCVM23005BKE.pdf](https://supremecourtdocket.mt.gov/APP/connector/9/368/url/321Z246_03WCCVM23005BKE.pdf). (Mont. Feb. 7, 2018) (No. DA 17-0599).

<sup>2</sup> *Id.*

<sup>3</sup> Appellee’s Answer Brief, *Cross v. Warren*, [https://supremecourtdocket.mt.gov/APP/connector/8/367/url/321Z24D\\_040WFTGRV0007EX.pdf](https://supremecourtdocket.mt.gov/APP/connector/8/367/url/321Z24D_040WFTGRV0007EX.pdf). (Mont. Apr. 9, 2018) (No. DA 17-0599).

<sup>4</sup> Appellant’s Opening Brief, *supra* note 1, at 2–3.

<sup>5</sup> Appellee’s Answer Brief, *supra* note 3, at 6–7.

GMC pickup truck into Appellants' vehicle, seriously injuring them.<sup>6</sup> Warren was insured through Progressive under policies held by his parents, Robert and Sherle Warren.<sup>7</sup> The liability policy covering the Taylor's GMC truck had "\$100,000 per person/\$300,000 aggregate coverage limits," as did three other policies the Warrens purchased from Progressive to cover their additional vehicles.<sup>8</sup> The Warrens paid separate premiums for each of the four policies.<sup>9</sup> Progressive paid each injured Appellant \$100,000, the "per person" limit on the GMC policy, but it denied Appellants' request to stack the liability limits on all four Progressive policies—stacking would have allowed Appellants to recover \$1,200,000 from Progressive.<sup>10</sup>

Progressive submitted rate filings to the Montana Commissioner of Insurance in early 2011 which included the information used by Progressive to determine the premiums for each policy held by the Warrens.<sup>11</sup> Appellants agree that Montana Code Annotated § 33-23-203(1)(c) allows an insurer to prevent stacking if it shows their premiums "actuarially reflect the limiting of coverage separately to the vehicles covered by the policy," but argue that Progressive failed to satisfy the requirement in its submitted filings.<sup>12</sup> Additionally, Appellees point out that the language of the GMC policy unambiguously and specifically provides that the Warrens' multiple policies cannot be stacked.<sup>13</sup>

The Twenty-Second Judicial District Court, Big Horn County, granted Progressive's motion for summary judgment.<sup>14</sup> The district court did not apply Section 33-23-203 in reaching its decision,<sup>15</sup> but nevertheless held that Montana law prohibits the stacking of liability coverage.<sup>16</sup> First, the court determined that first-party automobile insurance policies which protect the policyholder (e.g., Uninsured Motorist Coverage (UIM), Underinsured Motorist Coverage (UM), and Medical Payments Coverage (MP)) are inherently different from third-party coverages like the one issued for Warren's GMC.<sup>17</sup> Second, the district court reasoned that under

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<sup>6</sup> Appellant's Opening Brief, *supra* note 1, at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Appellee's Answer Brief, *supra* note 3, at 2.

<sup>11</sup> *Id.*

<sup>12</sup> Appellant's Opening Brief, *supra* note 1, at 29–30.

<sup>13</sup> Appellee's Answer Brief, *supra* note 3, at 42.

<sup>14</sup> Appellant's Opening Brief, *supra* note 1, at 3.

<sup>15</sup> *Id.*

<sup>16</sup> Appellee's Answer Brief, *supra* note 3, at 2.

<sup>17</sup> *Id.* at 19.

Montana law, stacking is only available to named insureds on an insurance policy.<sup>18</sup> Third, the court decided that third-party liability coverage is not “personal and portable” and is therefore not stackable.<sup>19</sup> The district court concluded that preventing third-parties from stacking multiple liability policies does not render the coverage illusory.<sup>20</sup>

The resolution of this case will likely hinge on the Montana Supreme Court’s interpretation and application of Section 33–23–203. The Montana Supreme Court must determine: 1) whether Section 33–23–203 applies to third parties, and whether it requires stacking or is merely applicable in stacking cases; and 2) whether Progressive met the statutory filing requirements, thereby permitting it to refuse to stack the policies.

## II. SUMMARY OF ARGUMENTS

### *A. Appellants’ Argument*

Appellants argue that the district court erred by not applying Section 33–23–203 in reaching its decision.<sup>21</sup> They contend that since its amendment in 2007, Section 33–23–203 has shifted from an anti-stacking statute to a pro-stacking statute that no longer differentiates between so-called first-party and third-party coverages.<sup>22</sup> Additionally, Appellants assert that modern liability policies are “personal and portable,” so courts should no longer be misled by “the so-called first-party/third-party distinction.”<sup>23</sup>

Appellants also argue that Progressive failed to satisfy the filing requirements set forth by Section 33–23–203(1)(c).<sup>24</sup> Section 33–23–203(1)(c) requires an insurer to file its rates with the Commissioner of Insurance and requires the rates to “actuarially reflect” the limiting of coverage to each separate vehicle covered by a policy. Appellants contend that Progressive failed to satisfy both requirements.<sup>25</sup> First, Appellants assert that the rates cannot actuarially reflect the limiting of coverage, because the Warrens’ liability coverage was not limited to specific covered autos under their policies; instead, it was “personal and portable,” therefore

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 20.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 23.

<sup>22</sup> *Id.* at 27.

<sup>23</sup> *Id.* at 26.

<sup>24</sup> *Id.* at 27.

<sup>25</sup> Appellant’s Opening Brief, *supra* note 1, at 29, 34.

preventing any actuarial reflection that the premiums paid were limited to the specific automobiles in the Warrens' policies.<sup>26</sup> Otherwise, the liability coverage would be rendered illusory; the Warrens paid valuable consideration for each of the policies and should be entitled to stack the benefits of each.<sup>27</sup> Second, Appellants argue that Progressive failed to satisfy the filing requirements of the statute, because it did not provide "actuarial certifications relative to its bodily injury liability policies."<sup>28</sup>

Finally, Appellants contend that the district court erred in concluding that stacking is only available to parties who are "insureds," as defined in the GMC policy.<sup>29</sup> Appellants concede that they do not fit the policy's definition of "insured," but assert that they should be entitled to stacking privileges nonetheless.<sup>30</sup> Since Taylor Warren was an "insured" under the Progressive policy, and since Montana courts recognize instances where third-parties may seek compensation directly from insureds (e.g., declaratory actions, actions under the Unfair Trade Practices Act, etc.), Appellants argue that they are entitled to stacking benefits.<sup>31</sup>

### *B. Appellee's Argument*

Appellees rebut the claim that Section 33–23–203 requires stacking of any type of insurance coverage, much less liability coverage.<sup>32</sup> Even if the Court decides Section 33–23–203 can be applied to third party liability coverage, Appellees argue that the statute's plain language does not require stacking.<sup>33</sup> Additionally, Appellees point to the legislative history of Section 33–23–203 to support the notion that the Montana Legislature intended for the statute to prevent stacking, not require it.<sup>34</sup> Further, Appellees assert that the absence of any stacking requirement under Section 33–23–203 is consistent with the Legislature's decision to set mandatory stacking limits; holding otherwise would "effectively mandate" excess liability coverage for any Montanan who owns more than one vehicle.<sup>35</sup>

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<sup>26</sup> *Id.* at 33.

<sup>27</sup> *Id.* at 31.

<sup>28</sup> *Id.* at 35.

<sup>29</sup> *Id.* at 35.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 42–43.

<sup>32</sup> Appellee's Answer Brief, *supra* note 3, at 7.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.* at 14.

Second, Appellees argue that since Appellants are not “insureds” under any of the Warrens’ policies, they had no reasonable expectations that the Warrens would carry any coverage beyond the minimum requirements set by Montana law.<sup>36</sup> Appellees respond to Appellants’ claim that stacking should be permitted due to Taylor Warren’s status as an “insured” by pointing to evidence that the Warrens themselves did not expect their multiple liability policies to stack and, therefore, Taylor Warren’s “insured” status is not grounds for stacking the policies.<sup>37</sup>

Third, Appellees argue that liability coverage cannot be “personal and portable,” because it is tied to a specific vehicle or its replacement and is required under Montana law.<sup>38</sup> Additionally, Appellees contend that the Warrens’ liability coverage is not illusory, as demonstrated by the fact that Progressive paid \$300,000 under the GMC policy—the maximum amount listed in the policy.<sup>39</sup>

Finally, Appellees assert that even if the Court holds that Section 33–23–203 requires stacking of liability coverage, Progressive met the statutory requirement to properly refuse stacking.<sup>40</sup> Appellees argue that the following facts demonstrate its statutory compliance: 1) Progressive’s premiums actuarially reflect the limiting of coverage to specific vehicles, because Progressive does not include stacked exposure in its calculations of premiums; 2) Progressive filed the rates with the Commissioner of Insurance; and 3) the policy language of the Warrens’ policies unambiguously state that coverage is limited to each insured vehicle and cannot be stacked.<sup>41</sup>

#### IV. ANALYSIS

A critical decision for the Montana Supreme Court is whether Section 33–23–203 requires or allows stacking third-party insurance coverage. Both parties agree that the current statute embodies the Court’s holding in *Hardy v. Progressive Specialty Ins. Co.*<sup>42</sup> In *Hardy*, the Court applied the pre-2007 version of Section 33–23–203 to a case involving an injured first-party Plaintiff who sought to stack his multiple UIM policies.<sup>43</sup> Applying the then-

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<sup>36</sup> *Id.* at 23.

<sup>37</sup> *Id.* at 25.

<sup>38</sup> *Id.* at 29.

<sup>39</sup> *Id.* at 34–35.

<sup>40</sup> *Id.* at 35.

<sup>41</sup> *Id.* at 35, 38, and 42.

<sup>42</sup> 2003 MT 85, 315 Mont. 107, 67 P.3d 892.

<sup>43</sup> *Id.*, ¶ 7.

existing statute, which prohibited stacking completely, the Court held that the statute as it existed was unconstitutional “to the extent that it allows charging premiums for illusory coverage.”<sup>44</sup> The Court’s holding, followed by the Legislature’s codification of it in the 2007 amendment to Section 33–23–203, seems to bolster Appellees’ argument that only first-parties can stack multiple policies under Montana law.<sup>45</sup> If nothing else, *Hardy* seems to at least require third-parties to prove liability coverages are illusory before successfully stacking them. If the Court reads *Hardy* and the statute to permit third parties to stack multiple liability policies, it will adopt Appellants’ argument that the statute transformed from a pre-*Hardy* stacking ban into a post-*Hardy* stacking requirement, allowing insurers to deny coverage only as provided in Section 33–23–203(1)(c).

If the Court holds that stacking of liability coverage is available at all under Section 33–23–203, another critical determination is whether Progressive met the requirements set by Section 33–23–203(1)(c) in refusing to stack the Warrens’ four policies. Progressive filed its premiums with the Commissioner of Insurance and provided affidavits to prove that its calculations of premiums were not based on stacked exposure.<sup>46</sup> Therefore, the Court must decide whether Progressive’s filings were sufficient, or whether, as Appellants argue, insurers must provide additional actuarial certification along with filings of their premiums on liability coverages.<sup>47</sup> A ruling in Appellants’ favor on this issue would not only require insurers to file additional documents, but it would also likely change the way rates are calculated. Permitting stacking in this case would require insurers to consider stacking exposure in calculating insurance rates—a consideration which could ultimately lead to higher premiums for Montanans.

## V. CONCLUSION

This case presents the Court with difficult legal questions that implicate statewide economic and social policies. For individuals, the Court’s decision will determine whether third parties can stack multiple liability coverages to pay their medical bills after injuries. For insurers, the Court will decide the scope of stacking and whether insurers are able to limit exposure therefrom.

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<sup>44</sup> *Id.*, ¶ 38.

<sup>45</sup> Appellee’s Answer Brief, *supra* note 3, at 5.

<sup>46</sup> *Id.* at 38.

<sup>47</sup> Appellant’s Opening Brief, *supra* note 1, at 35.